No.

Supreme Court, U.S.
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In The

Supreme Court of The United States

October Term, 2002

ORIGINAL

CHANARDAI SOOKDEO-RUIZ,

Petitioner,

v.

GCI GROUP,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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16 pp

Question Presented

The Pregnancy Discrimination Act of 1978 prohibits discrimination in employment on the basis of pregnancy. Unlike race, gender, national origin, etc., pregnancy is a temporary condition, and discrimination against a pregnant employee can more rationally be explained by the inconvenience and expense of pregnancy leave than the kind of bias and prejudice that often underlies other types of discrimination cases. Nevertheless, the courts typically analyze pregnancy discrimination claims based on circumstantial evidence using the four part prima facie case established by the Court in *McDonnell – Douglas* and its concomitant burden shifting scheme.

The question presented is whether a prima facie case of pregnancy discrimination is more appropriately analyzed according to the paradigm used in cases of unlawful retaliation, and whether summary judgment was properly granted where the termination of plaintiff's employment was in close temporal proximity to the employer's learning of plaintiff's pregnancy and where plaintiff had created issues of fact over whether the employer's proffered rationale was pretextual.

Statement Pursuant to Rule 29.6

Not applicable, since petitioner is a natural person.

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Petition for a Writ of Certiorari

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The district court's opinion (per Baer, D.J.) granting respondent's summary judgment motion is not published in the official reporter but is published at the following unofficial citations: 2001 U.S. Dist. LEXIS 1209; 85 Fair Empl. Prac. Cas. (BNA) 810; 80 Empl. Prac. Dec. (CCH) P40,552. The court of appeal's opinion (per curiam) affirming the district court's judgment is not published in the official reporter but appears at 2002 U.S. App. LEXIS 3640; 31 Fed. Appx. 17.

Statement of Jurisdiction

The court of appeals entered its opinion and order on March 5, 2002.

Statutory Provisions Involved

The relevant provisions of Title VII of the Civil Rights Act of 1964 and of the Pregnancy Discrimination Act of 1978, are as follows:

42 U.S.C. §2000e-2(a)(1) states in part:

> (a) Employer practices. It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his

> compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

42 U.S.C. §2000e(k) states in part:

> (k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy . . ..

Statement of the Case

Petitioner was employed by the respondent from April, 1997 until April 13, 1999 as a Billing Coordinator, assisting various public relations account teams prepare bills to their customers. On March 11, 1999, petitioner informed respondent that she was pregnant. Three weeks later, respondent put petitioner on a two week performance probation plan, indicating that if she did not improve her performance in each of thirteen areas she would likely be terminated. Prior to this date, respondent had never issued any sort of disciplinary or performance memos to the petitioner. Petitioner's last performance evaluation in October, 1998, rated petitioner's performance as "good." Two weeks later, petitioner was terminated, allegedly for poor performance.

Petitioner brought suit under Title VII of the Civil Rights Act of 1964 as amended by the Pregnancy Discrimination Act of 1978, 42 U.S.C. §2000e.

Following discovery, respondent moved for summary judgment. Respondent's motion for summary judgment asserted that petitioner was terminated for a legitimate, non-retaliatory business reason, i.e., poor performance. In support of its motion, respondent relied principally on the

affidavit of petitioner's former immediate superior, who recounted anecdotal accounts of complaints about petitioner's alleged poor performance, none of which had ever been communicated to petitioner. Respondent also relied on comments in petitioner's performance appraisal that noted room for improvement in several areas.

In opposing respondent's motion, petitioner pointed out that respondent had failed to address the curious timing of the performance probation plan, just three weeks after respondent learnt of petitioner's pregnancy. Petitioner argued that the failure to document any of these alleged deficiencies, even though they had supposedly existed for months, was itself sufficient to support a finding of pretext. Petitioner also relied on her satisfactory performance evaluation, positive feedback about her work, and a recent raise that she had received. Petitioner also rebutted in detail the anecdotal accounts of her claimed poor performance.

In determining respondent's summary judgment motion, the district court analyzed the issues under the McDonnell – Douglas burden shifting paradigm. Finding that the petitioner had raised doubts about respondent's proffered reasons for her termination, the district court nonetheless concluded that petitioner was not automatically entitled to proceed to trial. Rather, the district court reasoned, the Court's decision in *Reeves v. Sanderson Plumbing Prods., Inc.* 530 U.S. 133 (2000) and the Second Circuit's application of *Reeves* in *James v. New York Racing Association*, 233 F.3d 149, 156 (2d Cir 2000), required further analysis to determine whether petitioner's prima facie case taken with her evidence of pretext was sufficient to support a finding of discrimination.

The district court suggested that petitioner's prima facie case contained no evidence of discrimination, quoting language from *James*, *supra* to the effect that making a prima facie case under McDonnell – Douglas "requires no evidence of

discrimination." The evidence establishing the prima facie case to which the quoted language referred ("membership in a protected class, qualification for the position, an adverse employment action, and preference for a person not of the protected class") simply bore no resemblance to petitioner's prima facie case.

The district court then went on to cite the absence of any *direct* evidence of discrimination as dispositive:

> "[P]laintiff cannot point to a scrap of paper, a message, a conversation, or even an inappropriate remark to show that her termination was as a result of her pregnancy or that the defendant discriminated against her because she was pregnant."

Based on the foregoing analysis, the district court concluded that petitioner's evidence of pretext was insufficient to get her to a trial, and it granted respondent's motion for summary judgment.

The principal error of the district court was to reason that, since one type of prima facie case under McDonnell – Douglas "requires no evidence of discrimination,[1]" the prima facie case has no role to play in proving discrimination. This led the district court into its unnecessary, and erroneous wild goose chase for scraps of paper, messages, conversation, etc.

On appeal, the Second Circuit affirmed the district court's opinion per curiam. The Second Circuit did not address

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[1] This statement is actually a truism. The whole point of the prima facie case under McDonnell – Douglas is that the four elements, taken as a whole, are sufficient to give rise to an inference of discrimination. Thus, it is somewhat tautological to say that the prima facie *requires* no evidence of discrimination, since it is the prima facie case itself that is evidence of discrimination.

petitioner's argument that the district court should have used a retaliation analysis for deciding respondent's motion for summary judgment.

Reasons for Granting the Writ

The Court has never decided how a plaintiff makes out a prima facie circumstantial case of pregnancy discrimination under the Pregnancy Discrimination Act. The lower courts have generally followed the *McDonnell – Douglas* paradigm without much discussion, although the greater similarity to a retaliation case has not gone without note. *See, e.g., Klausner v. Industrial Risk Insurers, Inc.*, 1999 U.S. Dist. LEXIS 10219, 14 fn 7, (S.D.N.Y. 1999).

This case also presents the Court with a good opportunity to review the evidentiary role of the prima facie case in employment discrimination cases and to remind the lower courts that the *McDonnell Douglas* test is "not necessarily applicable in every respect to differing factual situations."

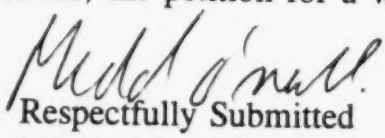
The benefit of endorsing the retaliation paradigm for pregnancy discrimination cases of this nature is that it would focus inquiry on what is typically the central question – whether there was a causal connection between the employee's pregnancy and the adverse employment action. Like retaliation cases, the temporal proximity of the adverse employment action to the employer's acquisition of certain knowledge often plays a key part. In retaliation cases, it is the employer's learning of the protected activity; in pregnancy cases, it is the employer's learning of the employee's pregnancy. Also, like in retaliation cases, the ultimate issue of "discrimination vel non" generally boils down to an either/or situation, that is, only one of two conclusions is possible. Either the employer took the adverse employment action for legitimate non-discriminatory (or retaliatory) business reasons or an unlawful consideration was present.

For example, petitioner's case presents a common fact pattern. An employee has a good track record with no negative performance issues, something happens (e.g., pregnancy or protected activity), and soon thereafter the employee suffers an adverse employment action. In cases such as this, if the employer's proffered reason is disbelieved, then the only logical conclusion to be drawn is that the pregnancy or protected activity, as the case may be, was the causal agent. Therefore, in cases such as petitioner's, evidence that raises an issue of pretext should be enough to defeat summary judgment, since a finding of pretext would also, almost invariably, lead to resolution of the ultimate issue of discrimination or retaliation in plaintiff's favor.

The superiority of this approach is readily apparent. Under *Reeves* and its progeny, the lower courts are called upon to determine, on a case by case basis, whether a plaintiff's prima facie case and evidence of pretext are sufficient to support a finding of discrimination. Given the wide range of fact patterns in employment discrimination cases, as well as the fact that the McDonnell – Douglas prima facie case often generates only a weak inference of discrimination, this is appropriate. In retaliation and pregnancy cases, however, where the adverse employment action follows closely on the heels of the employer's acquiring knowledge of the forbidden factor, there is no need to look for additional evidence of discrimination (or retaliation) once a triable issue of fact over pretext has been raised. When petitioner's case is so analyzed, it is clear beyond any doubt that there are triable issues of fact concerning whether there was a causal connection between petitioner's pregnancy and her termination. The judgment of the Second Circuit should be reversed, and the case should be remanded to the district court for further proceedings.

Conclusion

For the foregoing reasons, the petition for a writ of certiori should be granted.



Respectfully Submitted
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APPENDIX

UNITED STATES COURT OF APPEALS .FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 5th day of March two thousand and two.

PRESENT:

HONORABLE ROBERT D. SACK,
HONORABLE BARRINGTON D. PARKER, JR.,
HONORABLE JOHN R. GIBSON,*

Circuit Judges.

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CHANARDAI SOOKDEO-RUIZ,

Plaintiff-Appellant,

No. 01-7290

v.

GCI GROUP,

Defendant-Appellee.

----------x

* Of the United States Court of Appeals for the Eighth Circuit, sitting by designation

Appearing for Appellant: MICHAEL G. O'NEILL, New York, NY. Of the United States Court of Appeals for the Eighth Circuit, sitting by designation. Appearing for Appellee: HOWARD J. RUBIN, Davis & Gilbert LLP Robert H. Cohen, of counsel), New York, NY.

Appeal from the United States District Court for the Southern District of New York Harold Baer, Jr., Judge).

UPON DUE CONSIDERATION, IT: is HEREBY ORDERED,ADJUDGED and DECREED that the judgment of the District Court be, and it hereby is, affirmed.

The plaintiff appeals from the district court's entry of summary judgment against her on her claim of pregnancy discrimination under Title VII of the Civil Rights Act of 1964. Upon our de novo review of the record, see Bluestein & Sandler v. Chicago Ins. Co., 276 F. 3d 119, 121 (2d Cir. 2002), we agree with the court's conclusion that the plaintiff failed to create a triable issue of fact regarding the defendant's motive in dismissing her shortly after she announced her pregnancy.

Because the defendant has proffered a non-discriminatory reason for terminating the plaintiff-professional inadequacy it is entitled to summary judgment unless the plaintiff can "point to evidence that reasonably supports a finding of prohibited discrimination." James v. New York Racing Assoc., 233 F.3d 149, 154 (2d Cir. 2000). The evidence submitted by the plaintiff, that she suffered an adverse employment action after her announcement of pregnancy and that her supervisor was also pregnant when the plaintiff was terminated, is insufficient to support a jury finding in her favor, particularly in light of the evidence proffered by the defendant as to the causes and course of her dismissal.

For the foregoing reasons, the judgment of the district court is hereby AFFIRMED.

FOR THE COURT:

ROSEANNE B. MACKECHNIE, CLERK

BY: LUCILLE CARR DATE: 3/5/02

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CHANARDAI SOOKDEO-RUIZ,

Plaintiff, 00 CV 3517 (HB)

- against - OPINION AND ORDER

CI GROUP,

Defendant.

----------X

HON. HAROLD BAER, JR.,

The plaintiff, Chanardai Sookdeo-Ruiz ("Ruiz") brought this lawsuit against her former employer, GCI Group, Inc. ("GCI"), alleging that she was terminated as a consequence of her pregnancy and thus in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §20002e-2 ("Title VII"), Section 296 of the New York Executive Law ("Executive Law"), and Section 8 of the New York City Administrative Code, §8-101, et seq ("Administrative Code"). Plaintiff also alleges that defendants violated the Consolidated Omnibus Budget Reconciliation Act of 1985,29 USC § 1161, et seq. ("COBRA"). Defendants move for summary judgment with respect to both claims. For the following reasons, defendant's motion is granted with respect to plaintiffs discrimination claims and denied with respect to plaintiffs COBRA claims.

BACKGROUND

The facts are uncomplicated and for the most part undisputed. Ruiz worked for Grey Healthcare Group ("GHG") in the public relations department from May 1997

until it was acquired by GCI in January, 1999. She continued to work for GCI until April, 1999 when GCI terminated her. During her employment, her role changed some but essentially she was hired as a billing coordinator and was fired as a billing coordinator. In this position, Ruiz tabulated time charges forwarded by employees to ensure coordination between the time charges and the estimated amounts to be paid under the contracts between defendant and its clients.

At first plaintiff worked on only one major account but eventually that account departed, and she was given a group of smaller accounts and more responsibility after the merger in January, 1999.

Plaintiff received her initial performance review in early December 1997, some nine months after her job began. It suggested that she needed to improve her listening skills, that on occasion she failed to meet deadlines, and that she was inflexible with respect to adapting to new methods. It is undisputed as well that the second and only other written evaluation, rendered in October 1998, commented on both strengths and weaknesses and scored the plaintiff at 3.033 on a scale where 1 was the worst and 5 was the best score. As plaintiff herself opines, it was a rating just ever so slightly better than good. However, plaintiff also testified that it was "not the greatest" evaluation. This second evaluation prompted plaintiff's supervisor, Galvin, to advise her that she needed to be more efficient and learn to handle multiple tasks at one time. However, even after the evaluation and Galvin's advice, defendant claims that plaintiff failed to improve her performance.

As a consequence of these concerns, Galvin talked with other executives about discharging the plaintiff. In fact, during February of 1999, Galvin allegedly talked with Barbara Anderson at Trandon Associates, Inc., a job search firm, regarding a replacement for plaintiff.

On January 1, 1999, GCI acquired the public relations arm of GHG, and GCI required the billing department, which included the plaintiff, to change its methods of processing bills. As a result, plaintiff's job soon included handling, that is, tracking and billing, all public relations accounts and any new business, undisputedly a somewhat larger task. Unfortunately during this period after the merger the feedback on plaintiff's competency was at best mixed. Various account executives told Galvin that they would prefer to keep and do their own work rather than giving it to the plaintiff since they could handle the work more expediently and would not have to spend time reviewing plaintiffs errors.

On March 11, 1999, plaintiff told Gavin that she was pregnant. Interestingly, during the same conversation, Gavin announced to the plaintiff that she too was pregnant. Approximately three weeks after the pregnancy conversation, on March 30, defendant placed plaintiff on probation for her allegedly poor work performance. In the probation report, defendant listed 13 or more areas and told the plaintiff that she must improve with respect to each of them in order to continue in her position. Allegedly plaintiff did not improve in these areas, and she was terminated on April 13, 1999.

Plaintiff, however, contends that poor performance was not the gravamen of her termination pointing to her score on the October evaluation, the fact that she received positive feed back from the account team, had been told on occasion that she was doing a great job, had never been told by Gavin that she was in danger of losing her job, and had even been given additional tasks to say nothing of a 6.7% raise in 1998.

DISCUSSION

Summary judgment is appropriate where there are no disputed issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby. Inc.. 477 U.S. 242, 247-52 (1986); Tomka v. Seiler Corp. 66 F.3d 1295, 1313 (2d Cir. 1995). On a motion for summary judgment, the moving party has the burden of demonstrating the absence of any genuine issue of material fact. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). On the other hand, a party opposing a motion for summary judgment must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Com., 475 U.S. 574, 586 (1986). Rather the party must enumerate "specific facts and circumstances supported by deposition, affidavits based on personal knowledge, and admissions," and cannot rely on conclusory allegations or denials. General Elec. Co. v. New ~ York State Dep't of Labor, 936 F .2d 1448,1452 (2d Cir. 1991). Furthermore, a scintilla of evidence in support of the non-moving party's position is not sufficient to oppose successfully a summary judgment motion; "there must be evidence on which the jury could reasonably find for the plaintiff." Anderson, 477 U.S. at 250, 106 S.Ct. at 2511.

Defendant moves for summary judgment on plaintiffs pregnancy-related claim and her COBRA claim, and I will consider each in turn.

A. Plaintiffs Discrimination Claim

Plaintiff alleges that as a consequence of her revealing to her supervisor in March of 1999 that she was pregnant defendant placed her on probation three weeks later and fired her a month after that.

The framework for analyzing summary judgment motions in employment discrimination cases has most recently and perhaps most clearly been explained in James v New York Racing Association, 233 F.3d 149 (2nd Cir. 2000). I am guided by that decision here. In, an age discrimination case, the court evaluated its holding in Fischer v Vassar College, 114 F .3d 1332 (2d Cir. 1997) (en banc) in light of the Supreme Court's most recent employment discrimination case, Reeves v Sanderson Plumbing Prod, 530 U.S. 133, 120 SCt. 2097, (2000). The Second Circuit concluded that Fischer was in harmony with the standard laid out in Reeves. Thus, the question here is what do these cases stand for and what does that portend for this motion.

The James court began by reinforcing the application of the now familiar balancing test first enunciated in McDonnell Douglas Com. v. Green, 411 U.S. 792 (1973). The initial step in the test is to determine whether plaintiff alleged a prima facie case.

> This requires no evidence of discrimination. It is satisfied by a showing of "membership in a protected class, qualification for the position, an adverse employment action," and preference for a person not of the protected class.

James, 233 F.3d at 153-54. Thereafter, and assuming that plaintiff has established a prima facie case, a proposition not free from doubt in this case, the burden of going forward shifts to the defendant to show that it had a legitimate business reason for the determination. Of course, if the defendant does not come forward with reasons for its action, then plaintiff prevails. Id. at 154. In James, both the plaintiff and defendant met their respective burdens at these preliminary stages. The plaintiff then offered evidence of pretext to undermine the defendant's proffered reason for

plaintiffs termination. Thus, the issue was whether the plaintiffs evidence was sufficient to require the court to deny summary judgment and allow the case to proceed to trial.

The court explained that aller an employer asserts a legitimate reason for plaintiffs termination, the "presumption completely drops out of the picture [and] the employer will be entitled to summary judgment. . . unless plaintiff can point to evidence that reasonably supports a finding of prohibited discrimination." ~ In other words, "a case under Title VII becomes like any other case in that the plaintiff, in order to prevail, must have evidence from which the factfinder can reasonably find the essential elements of the claim." Id. at 154. Applying this standard to its facts, the James court concluded that, despite evidence of an occasional disparaging comment about older employees, plaintiff had pointed to no evidence supporting its allegation that defendant terminated him for a discriminatory purpose and granted summary judgment. Id.

The same reasoning applies here. Assuming plaintiff met her prima facie burden, defendant then offered a legitimate reason for her termination, namely that she was an unsatisfactory employee. However, plaintiff alleges that the doubts she has raised about defendant's proffered reasons for her termination entitle her to proceed to trial. This is clearly not plaintiffs automatic entitlement under James, rather I must evaluate plaintiffs claims as I would any other summary judgment motion, to determine if a reasonable factfinder could find in favor of the plaintiff. Plaintiff argues that defendant's decision to put her on probation was a sudden and disproportionate response to the concerns expressed in her evaluations and by her superiors. However, she has failed to offer a shred of evidence that defendant had a discriminatory motive. In fact, plaintiff cannot point to a scrap of paper, a message, a conversation, or even an inappropriate remark to show that her termination was as a

result of her pregnancy or that the defendant discriminated against her because she was pregnant.

By contrast, defendant has offered both evidence of plaintiffs inadequate performance and of the fact that 12 other women employees went on maternity leave between April, 1998 and June, 2000 without negative repercussions. True, plaintiff conjectures that the timing of the supervisor's pregnancy vis-a-vis hers supports her claim since there was a risk that their leave time might closely follow one another, however this conclusory allegation does not suffice. It is particularly significant that plaintiff has failed to substantiate this allegation with any evidence that her role and her supervisor's role are such so that even if their leaves overlapped it would create a significant problem for the defendant. In short, there is simply no evidence of intentional discrimination, and I conclude that a reasonable fact-finder could not conclude otherwise.

B. Plaintiffs COBRA claim

As to the COBRA claim, it appears that issues of fact abound. A recent amendment to the complaint seems to frame the issue but documents and testimony are required to reach a decision. That branch of the motion for summary judgment must be denied.

CONCLUSION

Summary judgment on the Title VII claim is granted. The COBRA claim will proceed to trial on Monday, February 25, 2001, at 9:30 am.

SO ORDERED

February 9 2001 -

Honorable Harold Baer, Jr.